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CERCLA's Retroactivity: Has the Door Been Opened for a Reevaluation of Whether CERCLA Applies to Preenactment Activities?

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CERCLA'S RETROACTIVITY: HAS THE DOOR BEEN OPENED FOR A REEVALUATION OF WHETHER CERCLA APPLIES TO PREENACTMENT ACTIVITIES?

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INTRODUCTION

On May 20th, 1996, the United States District Court for the Southern District of Alabama held in *United States v. Olin Corp.* that the liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act[1] (CERCLA) could not be applied to activities that predated CERCLA's enactment.[2] This decision represented a significant departure from several previous cases that found CERCLA applied retroactively.[3] On March 25, 1997, the United States Court of Appeals for the Eleventh Circuit reversed the district court decision and remanded the case for further proceedings.[4] Both of these cases received significant attention in environmental trade publications.[5] Because CERCLA represents the primary legal authority used to hold responsible parties liable for hazardous substance response

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[1]42 U.S.C. §§ 9601-9675 (1996).

[2]United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996) [hereinafter *Olin I*].

[3]*See generally* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985); Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984).

[4]United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997) [hereinafter *Olin II*].

[5]*See, e.g., AL Retroactivity Ruling 'Patently Erroneous,' DOJ Tells 11th Circuit*, HAZARDOUS WASTE LITIG. REP., Aug. 9, 1996, at 30763; *The Olin Decision Controversy*, MASS. ENVTL. COMPLIANCE UPDATE, Vol. 4, No. 10, Aug. 1996; *Retroactive Application of CERCLA Questioned in Two Cases*, REAL ESTATE/ENVTL. LIABILITY NEWS, Vol. 7, No. 18, July 22, 1996.

costs, the issue of whether CERCLA applies retroactively has significant economic,[6] environmental,[7] and political[8] ramifications.

This Article is composed of four sections. Part I provides a background of CERCLA and examines the facts and holdings of the district court and court of appeals decisions in *United States v. Olin Corp.* Part II evaluates the analysis used by the court of appeals and compares the analysis with other decisions that have also examined CERCLA's retroactive application. Part III addresses other issues that have been analyzed during judicial examinations of CERCLA's retroactive application. Part IV evaluates the *Olin* decisions in light of prior caselaw, suggests how CERCLA's retroactivity should be addressed, and discusses how a reauthorization of CERCLA may affect existing law. The Article concludes by explaining that if Congress reaches an agreement on changes to CERCLA's retroactive application, it is more likely that the changes will take the form of specific exemptions to CERCLA liability, rather than a universal repeal of retroactive liability.

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[6]There are currently 1,300 sites on the National Priorities List (NPL). The NPL identifies the nation's CERCLA sites that require the most immediate response action. It is estimated that the average expense of cleaning up each of these sites is $30 million. Moreover, this figure does not include various transaction costs associated with CERCLA response actions. Lindsay Newland Bowker, *Beyond Polarization: Superfund Reform in Perspective*, REAL ESTATE/ENVTL. LIABILITY NEWS, Vol. 8, No. 6, Jan. 24, 1997. *See also* Barnett M. Lawrence, Comment, *Liability of Corporate Officers Under CERCLA: An Ounce of Prevention May Be the Cure*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,377 (Sept. 1990) (describing the costs of CERCLA response actions).

[7]One of the most frequent criticisms aimed at CERCLA is that a significant portion of the money spent on response actions does not facilitate the actual cleanup of the environment. Rather, most of the money is spent on litigation and administrative expenses. *See, e.g.*, Bowker, *supra* note 6. At the end of 1996, $13.4 billion had been spent on CERCLA response actions, yet only 161 sites had been cleaned up. Much of the inefficiency is due to the fact that litigation plays a major role in CERCLA response actions. *Id.*

[8]There have been several legislative efforts to reform CERCLA. The degree, content, and focus of reform has been a major source of conflict within the 103rd, 104th, and 105th Congresses. Senate Republicans have indicated that CERCLA reform is one of the top ten legislative priorities for the 105th Congress. *See Senate GOP Unveils Reauthorization Plan*, SUPERFUND WEEK, Vol. 11, No. 4, Jan. 24, 1997; *Update on Superfund Reform*, WASH. ENVTL. COMPLIANCE UPDATE, Vol. 3, No. 5, Nov. 1996; *infra* notes 201-207 and accompanying text (discussing political efforts addressing CERCLA's retroactive application).

I. CERCLA BACKGROUND AND THE *OLIN* DECISIONS

A. Background of CERCLA

The need for a statute to address liability for hazardous substance response actions became apparent during the 1970s. During that time period, environmental disasters such as Love Canal[9] and the Valley of the Drums[10] received broad public attention. In response to public alarm over such incidents, Congress enacted CERCLA on December 11, 1980.

CERCLA (the "Act") provides for the cleanup of hazardous substance sites by allocating response costs among the parties responsible for contamination.[11] The Act imposes a severe liability

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[9]After investigating health complaints by residents in the Love Canal area of Niagra Falls, the New York Health Department learned that toxic chemicals had seeped into the basements of many homes and contaminated local soil, air, and water. Air pollution reached as much as 5,000 times maximum safety levels. The Hooker Chemical and Plastics Corporation had used a waterway as a depository for approximately 352 million pounds of industrial wastes. This contamination required the evacuation of 1,000 families and $30 million in cleanup expenses. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 493 (3rd ed. 1991). *See also* S. REP. NO. 96-848, at 2, 7755-61 (1980); President's Remarks on Signing H.R. 39 into Law, 16 WEEKLY COMP. PRES. DOC. 2757 (Dec. 2, 1980) (noting public concern over environmental and public health hazards posed by the improper disposal of hazardous substances).

[10]EPA discovered 17,000 drums of waste on a seven acre site near Louisville, Kentucky. Approximately 6,000 of those drums were releasing toxic chemicals into the environment. S. REP. No. 96-848 at 4 (1980), *reprinted in* Environmental and Natural Resources Policy Division, Library on Congress, 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, at 311 [hereinafter 1 CERCLA LEGISLATIVE HISTORY].

[11]Section 104 of CERCLA authorizes the President to conduct removal and remedial action in response to: (1) a release or a substantial threat of a release of a hazardous substance into the environment, or (2) a release or a substantial threat of release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to public health or welfare. CERCLA § 104, 42 U.S.C. § 9604 (1996). This authority has been delegated to various federal agencies. Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987). Those federal agencies can conduct response actions themselves and seek to recover response costs from responsible parties, or they may compel a responsible party to conduct the response action. *Id.* Response action includes both removal and remedial action. Of the two actions, remedial action is usually appropriate when the contamination is more severe or extensive (i.e., when the threat or release cannot be adequately addressed by removal action). Examples of removal action may include the use of security fencing, the provision of alternative water supplies, or the temporary evacuation and housing of threatened individuals. CERCLA § 101(23), 42 U.S.C. § 9601(23) (1996). Examples of remedial actions include: repair or replacement of leaking containers; onsite treatment or incineration; segregation of reactive wastes; and the use of perimeter protection measures such as dikes, trenches, or ditches. CERCLA § 101(24), 42 U.S.C. § 9601(24) (1996). *See* CERCLA § 101(23), (24) (providing complete definitions of removal and remedial action).

scheme that greatly favors the recovery of costs incurred for removal and remedial actions.[12]

CERCLA's liability scheme is composed of three major components. First, CERCLA establishes that a broad range of persons may be potentially responsible parties (PRPs). Section 107 of the Act provides that current owners and operators of disposal sites, past owners and operators of disposal sites, persons who arranged for disposal, and transporters of hazardous substances are all potentially liable for the payment of response costs.[13]

Second, CERCLA establishes that responsible parties are subject to strict, joint, and several liability. Consequently, one responsible party may be liable for all of the government's response costs. This liability may occur even if that responsible party acted without negligence or illegal intention.[14] It also makes no difference that the responsible party contributed only a small portion of the release.[15] Costs recoverable by the government include all costs associated with each element of the response action, including direct costs, indirect costs, and interest.[16] The responsible party may, however, seek financial contribution from other PRPs.[17]

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[12]Responsible parties are liable for all costs of removal or remedial action incurred by the United States government not inconsistent with the National Contingency Plan (NCP) (as provided for in section 105 of CERCLA); any other necessary response costs incurred by any other person consistent with the NCP; damages for injury to, destruction of, or loss of natural resources (including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release); and the costs of any health assessment or health effects study carried out under section 104(I) of CERCLA. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1996). The amounts recoverable under section 107 also include interest that starts accruing on the date that payment of a specified amount is demanded in writing or the date of the expenditure. *Id.*

[13]CERCLA § 107(a), 42 U.S.C. § 9607(a) (1996). Section 107(a) provides in relevant part that "(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or who arranged with a transporter for transport for disposal or treatment, of hazardous substances, . . . (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -- (A) all costs of removal or remedial action incurred by the United States government or a State . . .; (B) any other necessary costs of response incurred by any other person . . .; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury. . .".

[14]Because of the strict liability scheme, a party may be liable even if that party fully complied with all applicable hazardous substance disposal requirements at the time of disposal.

[15]CERCLA § 107(a), 42 U.S.C. § 9607(a) (1996).

[16]*See* United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1499 (6th Cir. 1989).

[17]A responsible party would generally seek financial contribution from other responsible parties under section 113(f) of CERCLA. Section 113(f) provides that any person may seek contribution from any party that may be potentially liable under section 107(a) of CERCLA. In

Third, CERCLA provides only limited defenses to its extensive liability scheme. Liability can only be avoided when the release resulted from an act of God, an act of war, an act or omission of a third party other than an employee or agent of the defendant, or any combination of those defenses.[18] Because the liability scheme of CERCLA is so exacting,[19] the application of CERCLA liability to preenactment activities represents a critical issue for numerous defendants.

B. The District Court Decision

The events that lead to the *Olin* decisions originated in the 1950s. The United States Environmental Protection Agency (EPA), acting through the United States Department of Justice (DOJ), alleged that Olin Mathieson operated two chemical plants between 1952 and 1982 that released mercury and chloroform into the environment.[20] Most of the alleged contamination occurred before the date of CERCLA's enactment.[21]

Accompanying EPA's complaint was a consent decree which both parties had signed. The consent decree provided that the Olin Corporation would be liable for all expenses related to the site's cleanup.[22] Despite both parties' willingness to enter into the consent decree, the district court, on its own initiative, requested that the litigants brief the issue of whether CERCLA could be applied retroactively.[23] The court explained that this briefing was necessary

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resolving a claim for contribution, a court may allocate response costs using such equitable factors as the court determines are appropriate. CERCLA § 113(f), 42 U.S.C. § 9613(f) (1996).

[18]CERCLA § 107(b), 42 U.S.C. § 9607(b) (1996).

[19]CERCLA liability has been described as "a black hole that indiscriminately devours all who come near it." Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994) (quoting Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6-7 (1993)).

[20]United States v. Olin Corp., 927 F. Supp. 1502, 1504 (S.D. Ala. 1996) (citing EPA Record of Decision at 8-10). The releases occurred through the use of a mercury-cell chloralkali plant and the later operation of a "crop-protection-chemical" plant. The company heading these operations began calling itself the Olin Corporation in 1978. The Olin plant site is comprised of 1,500 acres and lies in McIntosh, Alabama. EPA listed the Olin plant site on the NPL in 1982. *Id.*

[21]*Id.*

[22]The consent decree required the Olin Corporation to spend approximately $10.3 million to clean up the site and granted EPA broad discretion to amend the cleanup plan. According to the court, the decree made the Olin Corporation, its officers, directors, and associates liable for everything "even remotely associated with the cleanup" including the cost of insuring the government's automobiles used in fulfilling and supervising the consent decree. *Id.* at 1505.

[23]*Id.* at 1506-07.

because the court had a duty to ensure that the consent decree did not violate the United States Constitution, federal statutes, or controlling jurisprudence.[24] After its review, the district court determined that CERCLA could not be applied retroactively.[25]

The district court began its opinion by declaring that the Eleventh Circuit had never directly examined whether CERCLA applied retroactively.[26] Although acknowledging that several federal courts had determined that CERCLA applied retroactively,[27] the district court asserted that none of these decisions addressed CERCLA's retroactivity after the Supreme Court's decision in *Landgraf v. USI Film Products*.[28] Although *Landgraf* addressed the retroactive application of the Civil Rights Act of 1991,[29] the district court declared that the Supreme Court decision "demolishes" the interpretive premises upon which prior courts had based CERCLA's retroactive application.[30]

Landgraf arose out of a sexual harassment suit filed against USI Film Products.[31] The case addressed whether a provision in the Civil Rights Act of 1991 applied to preenactment activities.[32] *Landgraf* provided that a court must consider three steps of analysis to determine

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[24]*Id.* at 1507.

[25]It is important to note that there may have been some resentment to EPA's proposed consent decree by both Olin Corp. and the district court. The district court commented, "This is not an action in which anyone is trying to avoid a responsibility to the environment; Olin has agreed to perform the proposed remedial actions called for in the consent degree. The fact that Olin, despite its reservations about the fairness and even legality of the proposed consent decree, originally went along with the EPA is a vivid testament to the powerlessness felt by this citizen when forced to comply with various directives ordered by our administrative state." *Id.* at 1506 n.17. In a case decided after *Olin I*, the court suggested that the *Olin* district court decision may have been a reaction to the rigidity of EPA's proposed consent decree and to EPA's denial of Olin's request to conduct cleanup operations under the supervision of the Alabama Department of Environmental Management. *See* Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098, 1102 n.6 (E.D. Tenn. 1996).

[26]*Olin I*, 927 F. Supp. at 1507. *But see* Virginia Properties Inc. v. Home Ins. Co., 74 F.3d 1131, 1132 (11th Cir. 1996) (referring to CERCLA's retroactivity).

[27]*See generally* United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d. 726 (8th Cir. 1986); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982).

[28]511 U.S. 244 (1994).

[29]Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C. and 42 U.S.C.).

[30]*Olin I*, 927 F. Supp. at 1508.

[31]The plaintiff, Barbara Landgraf, asserted that a coworker had repeatedly harassed her during working hours. *Landgraf*, 511 U.S. at 247-48.

[32]While the plaintiff was waiting to appeal her district court decision, the President signed into law the Civil Rights Act of 1991. Section 102 of the Civil Rights Act of 1991 created a right to a jury trial during efforts to recover compensatory and punitive damages. The plaintiff asserted that section 102 applied to her case. *See id.* at 247.

whether a statute is retroactive. First, the examining court should determine whether the statute's text or legislative history clearly established a Congressional intent to apply the law retroactively. If this first inquiry is inconclusive, the court should determine whether the statutory provision at issue has a retroactive effect[33] on the litigants. If there is a retroactive effect, the court should determine whether the traditional presumption against retroactivity[34] applies to the statutory provision at issue. The traditional presumption against retroactivity can only be rebutted by showing that Congress clearly intended the statute to apply retroactively.[35] The *Olin* district court used these three steps in determining that CERCLA could not be applied to conduct that occurred before CERCLA's enactment.

In the first step of the *Landgraf* analysis, the district court determined that neither CERCLA's language nor CERCLA's legislative history clearly indicated that Congress intended CERCLA to be retroactive.[36] The district court conceded that the use of past tense in CERCLA's language provided "some evidence" that Congress intended sections 106(a) and 107(a) to apply retroactively, but the district court determined this evidence did not support a finding that Congress clearly intended the provisions to apply retroactively.[37] The district court emphasized that CERCLA lacks any language that specifically indicates a Congressional intent favoring retroactivity.[38] The district court also

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[33]A retroactive effect is one that impairs the rights that a party possessed when the party acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed. *Id.* at 269.

[34]The presumption against retroactivity provides that prospective application of a new rule of law is the appropriate default rule because the presumption accords with the widely held expectations. *Id.* at 273.

[35]Requiring clear intent assures that Congress has appropriately considered the potential unfairness that retroactive application of a law may effect. Such a requirement forces Congress to make necessary policy choices and to determine that the potential unfairness is an acceptable price to pay for the countervailing benefits brought about by the retroactive application of the law. *Id.* at 272-73.

[36]United States v. Olin Corp., 927 F. Supp. 1502, 1519 (S.D. Ala. 1996).

[37]*Id.* at 1513 (concurring with Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1309-11 (N.D. Ohio 1983) and United States v. Shell Oil Co., 605 F. Supp. 1064, 1073 (D. Colo. 1985)). Section 106(a) provides that when the President determines that there may be an imminent and substantial endangerment to public health, welfare, or the environment because of an actual or threatened release, the President may require the Attorney General to secure such relief as necessary to abate such danger or threat. The President may also, after notice to the affected State, take other action, including the issuance of such orders as may be necessary to protect public health and welfare and the environment. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1996).

[38]*Olin I*, 927 F. Supp. at 1512 n.39 (stating that DOJ and other parties have conceded that there are no unequivocal statements in CERCLA indicating a Congressional intent to make CERCLA apply retroactively). *See also* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1309 (N.D. Ohio 1983) (discussing CERCLA's absence of an express provision on retroactivity); Long

concluded that CERCLA's legislative history offers little insight into Congress' intentions.[39] The district court added that previous cases, which determined that CERCLA applied retroactively, either found evidence that did not exist[40] or conducted insufficient legal analysis.[41] Accordingly, the district court proceeded to the second and third steps of the *Landgraf* analysis.

In the second line of analysis, the district court concluded that CERCLA had a retroactive effect because application of its liability provisions attaches new legal consequences to events completed before CERCLA's enactment.[42] In reaching this conclusion, the district court rejected DOJ's position that the release at the Olin site represented a continuing release of hazardous substances, part of which occurred after CERCLA's enactment.[43] Therefore, the district court proceeded to the third step of analysis: whether the presumption against retroactivity should be applied to the particular provisions at issue.[44]

There is an established legal tradition disfavoring retroactive application of new laws.[45] A major justification for this tradition is that

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Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994).

[39]The district court commented, "The most that can be said from the legislative history is that Congress left many questions, including retroactivity, as open ones to be decided later." *Olin I*, 927 F. Supp. at 1515. The reason for the shortage of legislative debate is that Congress passed CERCLA during the final days of an outgoing Congressional session. The impending deadline limited the amount of debate and analysis that could be focused on the bill. *Id. See infra* notes 95-107 and accompanying text regarding CERCLA's enactment process.

[40]*Id.* at 1514-15 (asserting that previous cases interpreting CERCLA's legislative history have reached improper conclusions by "find[ing] clarity in legislative history which does not exist," or "plac[ing] weight on sources that have little or no value").

[41]*Id.* at 1509-10 (commenting "[a]s for *Northeastern*, on which [Department of] Justice relies, the case treats the presumption itself rather lightly. . . ."). *See also* United States v. Northeastern Pharm. and Chem. Co., 810 F.2d 726, 732-33 (8th Cir. 1986).

[42]*Id.* at 1516. The district court declared that application of section 107(a) of CERCLA in this case would impose new duties on completed transactions. *Id.* It is important to clarify that the district court distinguished whether a statute has a retroactive effect and whether the statute can be applied retroactively (i.e., is retroactive). The district court held that, while CERCLA has a retroactive effect, CERCLA was not intended to be retroactive (and therefore could not be applied retroactively). *Id.* at 1516-19.

[43]*Id.* at 1516 n.55. DOJ claimed the continuing nature of the release involved sufficient post-enactment conduct to hold the Olin Corporation liable even without retroactive application of the law. DOJ cited several cases indicating that legislation which is designed to alleviate a continuing public nuisance does not operate retroactively. *See id.* (citing Samuels v. McCurdy, 267 U.S. 188 (1925); Chicago & Alton R.R. Co. v. Tranbarger, 238 U.S. 67 (1915)).

[44]*Id.* at 1516.

[45]Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (stating that the presumption against retroactive legislation is deeply rooted in American jurisprudence and embodies a legal doctrine centuries older than the Republic). Unless Congress has made its intentions clear, courts have declined to give statutes retroactive application due to considerations of fair notice, reasonable reliance, and settled expectations. *Id.* at 269.

individuals should have the opportunity to be aware of a law and conform their conduct accordingly.[46] This is especially true in areas of law where predictability and stability are essential. Such areas include the law of contracts, property, and other areas involving financial liability.[47] On this basis, courts should not apply a new law retroactively unless Congress has clearly indicated such an intent.[48]

In its analysis, the district court noted that new provisions affecting punitive and compensatory damages were generally prospective unless Congress clearly indicated otherwise.[49] The district court found that the damages provided in sections 107 and 106 of CERCLA were more detrimental to defendants than compensatory damages.[50] Therefore, the district court concluded that the presumption against retroactive application must apply to sections 107(a) and 106(a).[51] Because neither CERCLA's statutory language nor CERCLA's legislative history provided the clear evidence necessary to overcome the presumption against retroactivity, the district court concluded that CERCLA is not retroactive.

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[46] *Id.*

[47] *Id.* at 271. The Supreme Court commented that in no case "in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Id.* at 284. *But see id.* at 269-70 n.24 (noting that governments may impose retroactive taxes and zoning regulations on past behavior in order to remedy past conduct). The Supreme Court noted, however, that when Congress enacts statutes with retroactive effects, the statutes are often aimed at correcting past mistakes and responding to emergencies. *Id.* at 267-68.

[48] *Id.* at 270. Such a requirement gives Congress the responsibility for making fundamental policy choices. *Id.* at 272-73. It is important to note, however, that in contrast to areas affecting financial liability, statutory provisions affecting procedural matters are presumed to apply to cases occurring after the statute's enactment (even if the cause of action occurred prior to the provision's enactment). *See id.* at 280 (stating that a right to a jury trial is plainly a procedural change that would ordinarily govern in trials conducted after its effective date).

[49] *Olin I*, 927 F. Supp. at 1517. *See also Landgraf*, 511 U.S. at 278-79 (discussing situations where laws are retroactive).

[50] *Olin I*, 927 F. Supp. at 1517. The district court found that section 107(c)(3) provides for punitive and treble damages which EPA uses as a "threat" during negotiations, and section 106 provides punitive fines for the failure to comply with executive orders. *Id.* This finding was important in determining whether the provisions could be applied retroactively because in *Landgraf*, the Supreme Court refused to apply compensatory relief retroactively. *Landgraf*, 511 U.S. at 281-82. On this basis, if the damages provided for by section 106 and section 107 were more detrimental to defendants than compensatory damages, there would be increased justification for not applying CERCLA retroactively.

[51] *Olin I*, 927 F. Supp. at 1517-18.

C. The Court of Appeals Decision

The Court of Appeals for the Eleventh Circuit overruled the district court's opinion on CERCLA's retroactivity.[52] The court of appeals examined the issue of CERCLA's retroactive application de novo and concluded that Congress clearly intended that CERCLA's liability provisions apply to preenactment activities. The court of appeals based its decision on two primary factors. First, the court found that CERCLA's language confirmed that Congress clearly intended CERCLA to apply retroactively.[53] In particular, the court of appeals asserted that the language of section 103 demonstrated a clear Congressional intent that the Act apply retroactively.[54] Second, the court of appeals held that CERCLA's purpose, as evidenced by the statute's structure and legislative history, also indicated that Congress intended the statute to impose retroactive liability.[55] The court emphasized that a major purpose of CERCLA was to require responsible parties to pay environmental cleanup costs.[56] The court also stressed that members of Congress generally believed that CERCLA and the legislative bills which preceded CERCLA were to apply retroactively.[57] The court of appeals concluded this evidence was sufficiently persuasive to overcome the presumption against

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[52]United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

[53]*Id.* at 1513.

[54]*Id.* Section 103 of CERCLA provides, "Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated ... a facility at which hazardous substances ... are or have been stored, treated, or disposed of shall ... notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility." CERCLA § 103(c), 42 U.S.C. § 9603(c) (1996).

[55]*Olin II*, 107 F.3d at 1513-14.

[56]*Id.* at 1514.

[57]*Id.* The court of appeals cited Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 662 (N.D. Ind. 1996) for the proposition that all the members of Congress commenting on parallel legislative bills expressed belief that the legislation would apply retroactively. *Olin II*, 107 F.3d at 1514. In its analysis of the legislative history, the court in *Ninth Avenue* focused on the fact that members of Congress intended that the persons responsible for the releases would pay the cost of responding to the abandoned hazardous substance sites. Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. at 661-63.

retroactivity.[58] Based on these reasons, the appellate court reversed the district court's order and remanded the case for further proceedings.[59]

II. LEGAL ANALYSIS OF THE COURT OF APPEALS DECISION

A. The Court of Appeals Decision on *Landgraf*

The court of appeals in *Olin* concurred with the district court in finding that *Landgraf* provides the analytical framework for determining whether a newly enacted[60] statutory provision applies retroactively.[61] Unlike the district court, however, the court of appeals did not find that *Landgraf* radically altered the interpretative premises upon which earlier courts approached retroactive analysis.[62] The court of appeals emphasized that *Landgraf* does not require that the law at issue contain a clear statement mandating retroactivity; rather, *Landgraf* only requires that there be a clear Congressional intent for retroactive application.[63] In this respect, the difference between the district court and the court of appeals decisions lies in their evaluations of whether there is enough evidence to demonstrate a clear Congressional intent favoring retroactivity.

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[58]The court of appeals cited *Landgraf* for the proposition that "constitutional impediments to retroactive civil legislation are now modest." *Id.* at 1512 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994)). It is important to clarify the purpose of the Supreme Court's statement was not to demonstrate why retroactive application of laws should be easier, but rather to indicate why each court should place great emphasis on the presumption against retroactivity. The Supreme Court in *Landgraf* was emphasizing why the presumption against retroactivity served such an important and necessary role. The statement was not, as the court of appeals indicates, evidence intended to support the application of retroactive liability.

[59]*Olin II*, 107 F.3d at 1515.

[60]As an aside, the court of appeals noted that *Landgraf* guides the review of "newly enacted laws." *Id.* at 1512 n.14. The court of appeals declared that there was no indication that *Landgraf* should be used to upset longstanding interpretations of existing laws. *Id.* The court of appeals concluded that although "a strong argument can be made that courts ought not to employ [*Landgraf*] to upset years of reliance on prior interpretations of existing laws," the court declined to further examine the issue because: (1) the issue was not raised by the parties, and (2) the court of appeals did not view *Landgraf* as providing a radical new course of interpretive analysis. *Id.*

[61]*Id.* at 1512 (recognizing that *Landgraf* "provides the analytical framework for determining whether newly enacted statutory provisions are applicable to pending cases") (quoting Hunter v. United States, 101 F.3d 1565, 1569 (11th Cir. 1996)).

[62]*See id.* at 1512 n.14 (stating that *Landgraf* reaffirms a "traditional presumption").

[63]*Id.* at 1513 n.16 (discussing that three of the Justices objected because the *Landgraf* majority adopted a "clear intent" standard, rather than a "clear statement" standard). *See also Landgraf*, 511 U.S. at 266.

B. CERCLA's Statutory Language

1. The Use of the Past Tense in CERCLA's Language

In determining that Congress clearly intended to apply CERCLA retroactively, the court of appeals first examined CERCLA's language. Using CERCLA's date of enactment as the point of reference, the court of appeals found that because section 107(a)(1) imposes liability upon owners and operators of any site where a hazardous substance *"has been deposited,"* and because section 107(a)(2) extends liability upon "any person who *at the time of disposal* of any hazardous substance *owned or operated*" such a site facility,[64] Congress intended to hold former owners and operators liable for preenactment activities.[65]

The court of appeals acknowledged that one may assert Congress intended the language of section 107 to apply prospectively[66] but disagreed with such an assertion for two reasons. First, the court of appeals held that there is insufficient evidence from either CERCLA's provisions or its legislative history to support such a position.[67] Second, the court of appeals claimed that the Act's other language demonstrates that Congress intended to apply CERCLA retroactively.[68]

Several other courts have also examined the verb tenses in section 107, and they have found the use of the past tense is evidence regarding Congressional intent on retroactivity.[69] Some of these courts have concluded that section 107 demonstrates that Congress clearly intended that CERCLA apply retroactively.[70] For example, in *Cooper Industries v. Agway, Inc.*, the district court for the Northern District of

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[64]*Olin II*, 107 F.3d at 1513.

[65]*Id.*

[66]*See id.* (stating that Olin contended Congress sought only to extend liability to persons who would become owners and operators after the enactment of CERCLA).

[67]The court of appeals stated, "[Olin] has pointed to nothing in the statute or its legislative history which supports this strained view." *Id.* at 1513.

[68]*Id.*

[69]*See, e.g.*, Cooper Indus. v. Agway, Inc., 987 F. Supp. 92, 103 (N.D.N.Y. 1997); United States v. Gurley, 43 F.3d 1188 (8th Cir. 1994); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732-33 (8th Cir. 1986); United States v. Shell Oil Co., 605 F. Supp. 1064, 1073 (D. Colo. 1985); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1310-11 (N.D. Ohio 1983).

[70]*See, e.g., Cooper Indus.*, 987 F. Supp. at 103; *Gurley*, 43 F.3d at 1188; *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 732-33 (stating that the language of the liability provision makes it "manifestly clear that Congress intended CERCLA to have a retroactive effect.").

New York decided that the many uses of the past tense in section 107 provide clear indication of CERCLA's retroactive application.[71]

Other courts have found, however, that the past tense does not provide evidence that Congress clearly intended to apply CERCLA retroactively.[72] Moreover, at least one defendant has asserted that the language in section 107 indicates that Congress intended to apply CERCLA prospectively.[73]

2. CERCLA's Notification Provision

The court of appeals also examined section 103 of CERCLA to determine whether Congress intended CERCLA to be retroactive.[74] Section 103 requires that any person who *at the time of disposal owned or operated* a facility at which hazardous substances *have been* stored, treated, or disposed shall notify EPA.[75] Failure to provide notification may result in the forfeiture of defenses established under section 107 of CERCLA.[76] The court of appeals asserted that because section 103 requires owners and operators to notify EPA even if the conduct

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[71]*Cooper Indus.*, 987 F.Supp. at 103. The court made particular note of the fact that there is no temporal limitation as to the scope of liability provided in section 107. *Id.* The court referred to other uses of the past tense in section 107 as emphasis for its conclusion. *Id. See also* CERCLA liability provisions that use the past tense of a verb: § 107(a)(2), 42 U.S.C. § 9607(a)(2), "any person who ... *owned or operated* any facility;" § 107(a)(3), 42 U.S.C. § 9607(a)(3) "any person who ... *arranged* for disposal or treatment, or *arranged* with a transporter;" and § 107(a)(4), 42 U.S.C. § 9607(a)(4) "any person who accepts or *accepted* any hazardous substances for transport to disposal." (emphasis added).

[72]*See, e.g., Shell Oil Co.*, 605 F. Supp. at 1073 (stating that, "I find and conclude that [C]ongressional intent to either impose or withhold liability for response costs incurred before CERCLA cannot be divined from verb tenses in § 107(a)"); *Georgeoff*, 562 F. Supp. at 1310-11. The *Olin* district court also reached this conclusion. United States v. Olin Corp., 927 F. Supp. 1502, 1513 (S.D. Ala. 1996).

[73]In *United States v. Shell Oil Co.*, the defendant asserted that the verb tense in section 107(a)(4) demonstrated that Congress intended the provision to apply prospectively. *Shell Oil Co.*, 605 F. Supp. at 1073. Section 107(a)(4), 42 U.S.C. § 9607(a)(4) (1996) provides, "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release ... *shall be liable* for ... all costs of removal or remedial action...." *See also* Summers v. Skibs A/S Myken, 191 F. Supp. 929, 930 (E.D. Pa.), *aff'd per curiam*, 926 F.2d 548 (3d Cir. 1961). In these cases, the defendant asserted unsuccessfully that because the word "shall" applies in the future, Congress intended that the liability provision would apply prospectively. It is important to note that the term "shall" in section 107(a)(4) applies to all liable parties identified in section 107(a). In this respect, the defendant's argument applies to retroactive analysis generally, not only to parties potentially liable under section 107(a)(4).

[74]United States v. Olin Corp., 107 F.3d 1506, 1513 (11th Cir. 1997).

[75]CERCLA § 103, 42 U.S.C. § 9603(c) (1996).

[76]*Id. See supra* note 18 and accompanying text regarding available legal defenses to CERCLA liability.

occurred prior to CERCLA's enactment, the liability provisions of section 107 must also apply to preenactment activities.[77] The rationale is that if persons were not liable for activities that predated CERCLA's enactment, there would be no reason to withhold use of liability defenses as penalty for failing to provide proper notice. Although the court of appeals found these provisions persuasive, other courts have not considered them dispositive.[78]

3. CERCLA's Natural Resource Damage Provisions

The court of appeals also stated that CERCLA's natural resource damage provisions provide further evidence that Congress clearly intended to apply the Act retroactively.[79] Because the court of appeals discussed this issue in a footnote, this conclusion appears less significant than other conclusions the court reached. Section 107(f)[80] and section 111(d)[81] of CERCLA limit the recovery of natural resource damages to actions which occurred after CERCLA's enactment.[82] Because these provisions are the only provisions in CERCLA that prohibit retroactive application, it has been asserted that there is a strong "negative inference" that legislators must have intended to apply retroactivity everywhere else in the Act.[83] If Congress did not intend that CERCLA apply retroactively, there would be no reason to include this specific language. Furthermore, if Congress had wished to limit

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[77]*Olin II*, 107 F.3d at 1513.

[78]*See, e.g.*, Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996) (holding that only CERCLA's legislative history provides adequate evidence to apply CERCLA retroactively).

[79]*Olin II*, 107 F.3d at 1513 n.17.

[80]Section 107(f) provides "[i]n the case of an injury to, destruction of, or loss of natural resources ... [t]here shall be no recovery ... where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980." CERCLA § 107(f), 42 U.S.C. § 9607(f) (1996).

[81]Section 111(d) provides, "No money in [Superfund] may be used ... where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980." CERCLA § 111(d), 42 U.S.C. § 9611(d) (1996).

[82]Courts have indicated that the purpose of this limitation is to preclude the use of Superfund money for the clean up of sites that are relatively stable. Because of the limited funds, Congress preferred to spend Superfund assets on unstable sites, not sites with damaged natural resources, but which were unlikely to deteriorate further. *See* Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 702 (D. Nev. 1996); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985).

[83]*See, e.g.*, *Shell Oil Co.*, 605 F. Supp. at 1075-76; Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1311 (N.D. Ohio 1983).

retroactive application of CERCLA's other provisions, it would have included specific language as it did for natural resource damages.

The Supreme Court has discredited the use of such negative inference reasoning. In *Landgraf*, the petitioner asserted that two sections of the Civil Rights Act of 1991 provided a strong negative inference that all sections of the Civil Rights Act of 1991 applied retroactively unless the provisions were specifically limited to prospective application.[84] The Court refused to infer that the statute was retroactive simply because two statutory provisions created a negative inference of retroactivity.[85] The Supreme Court asserted that it would have been unusual for Congress to define a statute's retroactive application through negative inference, especially considering the great burden imposed by retroactivity.[86] The district court, in *Olin I*, relied on this analysis in support of its decision that CERCLA did not apply retroactively.[87]

In *Olin II*, the court of appeals acknowledged *Landgraf* but noted that the Supreme Court did not preclude the use of negative inference analysis as evidence of retroactive intent.[88] The court of appeals also asserted that, unlike the statutory provisions at issue in

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[84]Section 402(a) of the Civil Rights Act of 1991 provides that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Civil Rights Act of 1991 § 402(a), Pub. L. No. 102-166, 105 Stat. 1071, 1099 (codified as amended in scattered sections of 2 U.S.C. and 42 U.S.C.). The petitioner asserted that the introductory clause of section 402(a) would be superfluous unless it referred to section 402(b) and section 109(c) of the Civil Rights Act of 1991 (both of which provided for prospective application). Landgraf v. USI Film Prods., 511 U.S. 244, 258 (1994). Section 402(b) provides that, "[n]otwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." Civil Rights Act of 1991 § 402(b), Pub. L. No. 102-166, 105 Stat. 1071, 1099 (1991). Section 109(c) provides that, "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Civil Rights Act of 1991 § 109(c), Pub. L. No. 102-166, 105 Stat. 1071, 1078 (1991). According to the petitioner, section 402(b) and section 109(c) of the Civil Rights Act of 1991 represent the other provisions contemplated by the introductory clause of section 402(a) and together create a strong negative inference that all sections of the Civil Rights Act of 1991, not specifically declared prospective, apply to all cases pending before enactment. *Landgraf*, 511 U.S. at 258.

[85]The Supreme Court stated that the petitioner, "places extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute." *Landgraf*, 511 U.S. at 258.

[86]*Id.* at 259. Retroactive application of the Civil Rights Act of 1991 could have required the retrying of cases as well as subjecting employers to punitive damages for conduct that occurred before the provision's enactment. *Id.*

[87]United States v. Olin Corp., 927 F. Supp. 1502, 1509 n.36 (S.D. Ala. 1996).

[88]United States v. Olin Corp., 107 F.3d 1506, 1513-14 n.17 (11th Cir. 1997) (citing Nevada v. United States, 925 F. Supp. 691, 693 (D. Nev. 1996)).

Landgraf, the natural resource provisions in CERCLA are closely connected to the liability provision.[89]

There are other important differences between the retroactive implementation of CERCLA and the Civil Rights Act of 1991. When the Supreme Court limited the Civil Rights Act of 1991 to prospective application, the Court facilitated the remedial scheme of the Civil Rights Act of 1991 and upheld previous judicial interpretations of the statute.[90] Prospective application of CERCLA, on the other hand, would contravene precedent and would arguably frustrate a purpose of the Act.[91] Furthermore, while the provisions identified in the Civil Rights Act of 1991 are of minor significance in relation to the entire Act,[92] the natural resource damage provisions represent important sections of CERCLA.[93]

Although the Eleventh Circuit found this evidence to be persuasive, courts have varied on whether the language of CERCLA demonstrates that Congress clearly intended the Act to apply retroactively.[94] There is, however, greater judicial consensus that CERCLA's legislative history provides evidence necessary to satisfy the *Landgraf* standard.

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[89]*Olin II*, 107 F.3d at 1513-14 n.17. The court of appeals stated, "[u]nlike the prospective provisions in the 1991 Civil Rights Act ... which were not connected to the specific provisions that the plaintiff wanted to apply retroactively, liability for response costs, liability for natural resource damages, and the prospective limitation for natural resource damages are all part of the same section in CERCLA." *Id.* (quoting Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 659 (N.D. Ind. 1996)).

[90]*See Landgraf*, 511 U.S. at 259 (stating that purely prospective application of the 1991 Civil Rights Act would prolong the remedial scheme and preserve judicial precedent).

[91]CERCLA was enacted to facilitate the cleanup of inactive hazardous substance disposal sites. Preamble to CERCLA, Pub. L. No. 96-510, 94 Stat. 2767. Limiting CERCLA's application to post-enactment activities would exempt a large number of defendants from liability and reduce the amount of funding available for response actions. Although Superfund could pay for some response actions, Superfund could not pay for all necessary response actions. *See infra* notes 155-164 and accompanying text discussing funding appropriated for the Superfund program. *But see Olin I*, 927 F. Supp. at 1518 (indicating that Superfund can pay for preenactment releases and insufficient funding does not render a statute ineffective).

[92]*See* Civil Rights Act of 1991 §§ 109(c), 402(a), (b).

[93]*See* Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098, 1103 (E.D. Tenn. 1996) (providing that unlike the minor provisions of the 1991 Civil Rights Act at issue in *Landgraf*, the natural resource damage provisions play major roles in the statutory scheme of CERCLA); Nevada *ex rel* Dep't of Transp. v. United States, 925 F. Supp. 691, 701-02 (D. Nev. 1996) (distinguishing the negative inference as applied in *Landgraf* from CERCLA because the "sections of CERCLA which create liability for response costs ... and damage to natural resources ... are hardly 'minor and narrow provisions' [as were the provisions at issue in *Landgraf*]").

[94]*See* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); Chenault v. United States Postal Service, 37 F.3d 535, 538 (9th Cir. 1994); United States v. Shell Oil Co., 605 F. Supp. 1064, 1069 (D. Colo. 1985); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983).

C. Legislative History

1. The Legislative Circumstances of CERCLA's Enactment

CERCLA's legislative history provides the most compelling evidence that courts have found to justify CERCLA's retroactivity.[95] This fact remains true even though CERCLA's legislative history has been widely criticized for its lack of clarity.[96] The legislative history is so indefinite, one court stated, that criticizing Congress for the ambiguities and problems in CERCLA's legislative history was the judicial equivalent of "shooting fish in a barrel."[97]

The haste of CERCLA's enactment is one factor contributing to the unreliability of the legislative history.[98] CERCLA was rushed through Congress in an effort to pass the law before the end of the

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[95]*See Nova Chems.*, 945 F. Supp. at 1103 (stating that the clearest expression of Congressional intent to make CERCLA retroactive is revealed in CERCLA's purpose and legislative history); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 660 (N.D. Ind. 1996) (holding that the legislative history of CERCLA reveals that the clear intent of Congress was to provide for retroactive application of CERCLA's liability provisions); Nevada *ex rel* Dep't of Transp. v. United States, 925 F. Supp. at 695 (same); *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 733 (stating that the legislative history and statutory scheme confirm CERCLA's retroactivity).

[96]*See* HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 327 (D. Md. 1993) (declaring that the legislative history of CERCLA cannot support the weight of a legal determination); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993) ("Congressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship"); Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc., 931 F.2d 327, 330 n.3 (5th Cir. 1991) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.") (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)). *See also* John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405 (1997).

[97]*HRW Sys., Inc.*, 823 F. Supp. at 327 (quoting 1 CERCLA LEGISLATIVE HISTORY, *supra* note 10, at 788-89). "The Court will decline the opportunity of taking what amounts here to a point-blank shot at a stationary target because Representative Harsha has already done the job: 'There are numerous deficiencies as our handout demonstrates. The bill is not even drafted in a technically sound manner.... We are establishing civil liability and criminal penalties in this legislation, and numerous questions have been raised as to what we are doing to common law with this new statute. These are not spurious issues. They are going to be litigated and the courts are going to have a field day in ridiculing the Congress on passing laws that are vague, internally inconsistent, and using tools such as superseding laws which are in conflict without any further guidance. This bill is not a superfund bill – it's a welfare and relief act for lawyers.'" *Id.*

[98]The district court found that CERCLA's legislative history demonstrates that legislators agreed to disagree on CERCLA's retroactive application. United States v. Olin Corp., 927 F. Supp. 1502, 1515 (S.D. Ala. 1996). The district court emphasized that the political circumstances surrounding the passage of CERCLA prevented its legislative history from being a reliable source of analysis. *Id.*

legislative session.[99] Haste was so critical that numerous errors existed in the amended bills introduced before Congress.[100] Under pressure to approve a version of the legislation, Congress enacted CERCLA without the extensive review and debating procedures that usually accompany the legislative process.[101] Furthermore, the recorded legislative history that does exist is an incomplete indication of the legislature's deliberations.[102] Much of the legislative discussion occurred off-the-record.[103] Although members of Congress addressed retroactivity to some degree, these discussions did not take place during formal floor debates and are largely unrecorded in committee hearing or bill markup transcripts.[104]

Besides the haste of enactment, Congress enacted CERCLA under a suspension of rules provision which mandated that the bill could only be passed without amendment.[105] According to the district court's analysis, Congress was faced with only two choices: either reject the bill completely or enact the bill despite its faults.[106] Because CERCLA contained a legislative veto provision that would have facilitated Congressional amendment to the statute, the circumstances favored CERCLA's quick enactment.[107]

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[99]Members of Congress objected to the haste in which the bill was enacted. H.R. 96-7020, § 3071 (1980), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (SUPERFUND), SENATE COMMITTEE ON ENVIRONMENTAL AND PUBLIC WORKS, 96th Cong., at 787-89 (1980) [hereinafter 2 CERCLA LEGISLATIVE HISTORY].

[100]Representative Snyder commented, "[O]ur legislative counsel briefly looked at this bill and found 45 technical errors. . . . There is no telling how many (errors) he could find if he got to study it a little bit." *Id.* at 805.

[101]*Olin I*, 927 F. Supp. at 1513-14.

[102]*See* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 843 (W.D. Mo. 1984).

[103]*Id.*

[104]*Id.* (stating that "it is difficult to believe that if Congress had intended to make the defendants liable for pre-CERCLA expenses, it would not have said so explicitly and clearly in the statutory language, committee reports or floor debates"); *accord* United States v. Wade, 577 F. Supp. 1326, 1335-36 (E.D. Pa. 1983).

[105]*See Olin I*, 927 F. Supp. at 1514 (citing FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW Sec. 4A.02[2][a], at 4A-51 (1994) (citations omitted)).

[106]*Id.* at 1515. *See also* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (stating that CERCLA "was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.").

[107]According to the district court, because Congress presumed that revisions could be easily enacted, legal issues such as retroactivity were left ambiguous under the expectation that Congress could revisit those issues without concern of a presidential veto. *Olin I*, 927 F. Supp. at 1515. Congressional use of the legislative veto has since been declared unconstitutional. INS v. Chada, 462 U.S. 919 (1983).

2. Detailed Discussion of the Court of Appeals Decision on CERCLA's Legislative History

Unlike the district court, which found that CERCLA's legislative history proves that Congress left many issues undecided,[108] the Eleventh Circuit court of appeals determined that CERCLA's legislative history and legislative structure confirmed that Congress clearly intended CERCLA to apply retroactively.[109] The court of appeals asserted that Congress intended that the parties who were responsible for the disposal would pay the response costs, not the public.[110] The court of appeals referenced CERCLA's legislative history and statutory structure to support its position.[111] According to the court of appeals, because the purpose of the Act can only be realized through retroactive application of CERCLA, Congress must have intended CERCLA to be retroactive.[112]

The court of appeals cited CERCLA's chief predecessor bill, Senate Bill 1480,[113] as evidence of a clear Congressional intent favoring retroactive application of the Act. The court of appeals claimed that although Senate Bill 1480 contained no express statement concerning retroactivity, all Congressional commentators believed that the proposed statute would apply to preenactment activities.[114] The court

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[108]*Olin I*, 927 F. Supp. at 1515.

[109]United States v. Olin Corp., 107 F.3d 1506, 1513-14 (11th Cir. 1997).

[110]*Id.* The court of appeals states, "[a]n essential purpose of CERCLA is to place the ultimate responsibility for the clean up of hazardous waste on 'those [parties] responsible for problems caused by the disposal of chemical poison[s].'" *Id.* at 1514 (quoting Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1501 (11th Cir. 1996)). Numerous other courts have shared this interpretation. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986); United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985).

[111]The court of appeals cited a statement from the Congressional Report providing that the government only pays response costs "where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup." *Olin II*, 107 F.3d at 1514 n.18 (quoting 1 CERCLA LEGISLATIVE HISTORY, *supra* note 10, at 320 (Committee Report)). The Senate Report confirms this Congressional intent. The report states, "[S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator [or] transporter ... who has profited or otherwise benefitted from commerce involving these substances." S. REP. NO. 96-848, at 98 (1980). The court of appeals also stated that CERCLA's statutory structure, which lists the liability provisions "ahead" of the government-funding sections, confirms these priorities. *Olin II*, 107 F.3d at 1514 n.18 (referencing CERCLA § 107, 42 U.S.C. § 9607 (1996) and CERCLA § 111, 42 U.S.C. § 9611 (1996)). Presumably, by placing the liability provisions before the funding provisions, Congress intended to emphasize the broad nature of liability.

[112]*Olin II*, 107 F.3d at 1514.

[113]S. 1480, 96th Cong. (1979).

[114]*Olin II*, 107 F.3d at 1514 (citing Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 662 (N.D. Ind. 1996)).

of appeals rejected the district court's view that the legislative discussion related to Senate Bill 1480 carried little influence.[115] According to the court of appeals, the legislative discussion accompanying Senate Bill 1480 was influential for two reasons. First, the liability provisions from Senate Bill 1480 were incorporated into CERCLA.[116] Second, the issues of contention over the passage of Senate Bill 1480 did not relate to retroactivity, but rather addressed joint liability, several liability, and personal injury.[117]

3. Analysis of Legislative History

The court of appeals failed to address some valid issues raised in the district court's analysis of legislative history. In particular, the court of appeals addressed neither CERCLA's absence of an express provision on retroactivity[118] nor why retroactivity was not specifically discussed in Congressional floor debates.[119] Because these two elements of the legislative history can be extremely telling, their absence diminishes the persuasiveness of legal decisions that use CERCLA's legislative history as proof that Congress intended the statute to apply retroactively. At a minimum, it is surprising that retroactivity was unaddressed in these forums considering the perceived unfairness of retroactive liability.[120] As *Landgraf* emphasized, one of

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[115]*Id. See also* United States v. Olin Corp., 927 F. Supp. 1502, 1514 (S.D. Ala. 1996) (indicating that CERCLA's legislative history provides little valuable insight).

[116]*See Olin II*, 107 F.3d at 1514 n.20 (comparing S. 1480, § 4(a)(1) with CERCLA § 107(a)(4)(A)-(B), 42 U.S.C. § 9607(a)(4)(A)-(B) (1996)).

[117]*See Olin II*, 107 F.3d at 1515 (citing statements of Senator Randolf and Senator Stafford, at 1 CERCLA LEGISLATIVE HISTORY, *supra* note 10, at 681-96). *But see* George Clemon Freeman, Jr., *A Public Policy Essay: Superfund Retroactivity Revisited*, 50 BUS. LAW. 663, 672-73 n.56-57 and accompanying text (1995) (describing the objections of Senators Domenici, Bentsen, and Baker regarding retroactive application of S. 1480's liability provisions).

[118]There is also no provision in CERCLA's implementing regulations that explicitly provides for retroactive application of the statute. CERCLA's implementing regulations are provided in the National Contingency Plan (NCP) at 40 C.F.R. Part 300. *See also* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986) (noting that the NCP does not expressly provide for retroactive application of CERCLA's liability provision). It has been asserted that because section 107(a) of CERCLA provides that only costs "not inconsistent" with the NCP are recoverable, and because the NCP does not specifically address retroactivity, that recovery of preenactment costs is unjustified. This argument was rejected in *United States v. Shell Oil Co.* on the grounds that section 107(a) addresses the nature of response actions for which costs can be recovered, not the timing of those actions. *Shell Oil Co.*, 605 F. Supp. at 1074.

[119]*See Olin II*, 107 F.3d at 1506.

[120]*See Olin I*, 927 F. Supp. at 1515 (quoting Ohio *ex rel* Brown v. Georgeoff, 562 F. Supp. 1300, 1309 (N.D. Ohio 1983) for the proposition that, "[i]t would have been a simple matter for Congress to have included a provision within the Act providing that liability would be imposed retroactively. Given the undoubted Congressional awareness of an existing problem, this omission

the main reasons for the presumption against retroactivity is to ensure that Congress evaluated the burdens and benefits associated with retroactive application of a law.[121]

Notwithstanding the above reasoning, the absence of an express statement on retroactivity can be interpreted in two ways. As the district court found, it may imply that Congress did not reach a consensus on retroactivity but enacted the statute with the issue unresolved in order to pass the bill before the end of the session.[122] On the other hand, Congress may have lacked sufficient time to draft a more thorough version of the law that clearly reflected Congressional consensus on retroactivity. The absence of an express statement on CERCLA's retroactivity and the lack of a formal legislative discussion on retroactivity[123] may be more of a reflection of time constraints rather than of Congressional intentions.

Instead of responding to the district court's assertions regarding CERCLA's legislative history, the court of appeals supported its own conclusions by citing the legislation that preceded CERCLA.[124] The legislative enactment process of CERCLA's major liability provision, section 107, is difficult to follow and less conclusive than might be expected from the legal decisions that have held the enactment process demonstrates Congress intended CERCLA to apply retroactively.[125] On April 2, 1980, the United States House of Representatives introduced House Bill 7020.[126] This bill provided that responsible parties were liable for releases of hazardous substances regardless of whether such releases occurred before, during, or after enactment of the proposed statute.[127] But when House Bill 7020 was reported out of committee for

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takes on special importance. There can be no question that Congress was aware that the issue of retroactivity could arise. Yet, Congress failed to make this statement." *See also* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 843 (W.D. Mo. 1984) (stating that "it is difficult to believe that if Congress had intended to make the defendants liable for pre-CERCLA expenses, it would not have said so explicitly and clearly in the statutory language, committee reports or floor debates."); *accord* United States v. Wade, 577 F. Supp. 1326, 1335-36 (E.D. Pa. 1983).

[121] *See supra* note 35 and accompanying text regarding the importance of Congressional deliberation.

[122] *Olin I*, 927 F. Supp. at 1515 (indicating that Congress deliberately deferred many legal issues because Congress expected the issues would be decided at a later date).

[123] Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1311 (N.D. Ohio 1983).

[124] United States v. Olin Corp., 107 F.3d 1506, 1514 (11th Cir. 1997).

[125] *See, e.g.*, Continental Title Co. v. Peoples Gas Light & Coke Co., 959 F. Supp. 893, 897 (N.D. Ill. 1997); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 737 (8th Cir. 1986); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985).

[126] H.R. 7020, 96th Cong. (1980).

[127] H.R. 7020, § 5.

Senate review, the committee members had removed its former provision on retroactivity.[128] This bill was then sent to the Senate for review.

The Senate passed Senate Bill 1480 instead of the House legislation.[129] Senate Bill 1480 lacked an express provision on retroactivity.[130] Nonetheless, when Senate Bill 1480 went before the Committee on Environment and Public Works, Senator Domenici expressed concern over the retroactive reach of the proposed law.[131] Senator Domenici and the Committee members, therefore, included an amendment that limited the retroactive reach of several liability provisions[132] but did not affect the retroactive reach of response cost liability.[133] The Senate Report, and Senator Domenici himself, indicated that the amendment did not affect liability for the costs associated with removal actions.[134] The amendment lacked any express statement on retroactivity, but judicial interpretation has concluded that the amendment operated retroactively through "negative implication."[135] This version of the bill was reported out of the Senate Committee on Environment and Public Works on July 11, 1980, and out of the Committee on Finance on November 18, 1980.[136]

After review, the Senate rejected this version of the legislation and instead introduced Amendment No. 2631.[137] Like all the earlier versions of the statute, Amendment No. 2631 lacked an express

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[128]*Continental Title Co.*, 959 F. Supp. at 897.

[129]*Id.*; 1 CERCLA LEGISLATIVE HISTORY, *supra* note 10, at 774-75.

[130]S. 1480, 96th Cong. § 4 (1980).

[131]*Shell Oil Co.*, 605 F. Supp. at 1077 (citing Transcript of Senate Committee on Environment and Public Works, Mark-up Session of S. 1480, June 26-27, 1980). On this basis, it appears that these Committee members assumed that the bill operated retroactively.

[132]Senator Domenici's modifying amendment, section 4(n), precluded the retroactive reach of some liability provisions, and limited the retroactive reach of other liability provisions to January 1, 1977. *Continental Title Co.*, 959 F. Supp. at 897.

[133]The amendment provided that no person may recover for specified damages or for the release of hazardous substances, from which such specified damages resulted, which occurred before enactment of the Act. S. 1480, 96th Cong. § 4(n)(1) (1980). Those damages included, but were not limited to, expenses associated with injury to, destruction of, or loss of natural resources and real or personal property. *Id.* § 4(a)(2).

[134]Senate Committee on Environment and Public Works Report, S. DOC. NO. 96-848 at 37 (July 11, 1980). Senator Domenici commented that the costs of temporary and permanent relocation of residences shall be considered costs of removal, and therefore, are "not affected by the retroactive limitation." Transcript of Senate Committee on Environment and Public Works Mark-Up Session of S. 1480, 194-95, June 26, 1980.

[135]*Continental Title Co.*, 959 F. Supp at 897 n.4. Presumably, the amendment operated retroactively because there was a limit on its retroactive effect.

[136]1 CERCLA LEGISLATIVE HISTORY, *supra* note 10, at 305, 344-45, 462, 499-501.

[137]*Id.* at 560-775. *See also* 126 CONG. REC. S30,916 (daily ed. Nov. 24, 1980) (discussing Amendment No. 2631).

statement regarding the retroactive liability of response costs.[138] Because the language between Senate Bill 1480 and Amendment No. 2631 is so similar,[139] courts have concluded that the Congressional intent on response cost liability was retained.[140] The Senate and House passed this latest version of Senate Bill 1480 which the President signed on December 11, 1980.[141] As such, courts have relied on the assumptions associated with the original version of Senate Bill 1480 as proof that Congress intended to apply CERCLA retroactively.[142]

After reviewing the series of legislative amendments, it is difficult to conclude that the process demonstrates that Congress clearly intended CERCLA to apply retroactively. To hold otherwise requires that one rely on a series of compounded assumptions (many of which are unexpressed) made during the legislative process. Moreover, all of these assumptions are based on the original assumption made by the few members of the Senate Committee on Environment and Public Works.

There are several reasons why the amendment process, by itself, does not demonstrate that Congress clearly intended to apply CERCLA retroactively. Even though members of the Senate Committee on Environment and Public Works understood their

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[138]The amendment did, however, provide that liability for natural resource damages was only prospective. 1 CERCLA LEGISLATIVE HISTORY, *supra* note 10, at 560-775; *Continental Title Co.*, 959 F. Supp. at 898; CERCLA § 107, 42 U.S.C. § 9607 (1996).

[139]Amendment No. 2631 is clearly based on section 4(n) of S. 1480. *See Continental Title Co.*, 959 F. Supp. at 898-99 (providing a line-by-line comparison of section 4(n) with Amendment 2631 as enacted by CERCLA). The main differences between Amendment No. 2631 and section 4(n) are their treatment of economic loss, personal injury, loss of income, and out-of-pocket medical expenses. *Id.* at 898.

[140]*See Continental Title Co.*, 959 F. Supp. at 898-99 (concluding that Congress' intent to impose retroactive liability for response cost remained unchanged). The court cited provisions from the legislative record indicating that Senator Domenici's amendment, upon which CERCLA appears to have been based, did not alter the retroactive application of the statute's liability provision. *Id.*

[141]*Id.* at 897.

[142]The Senate legislative process upon which the courts have relied upon to prove CERCLA's retroactivity proceeds as follows: (1) S. 1480 is proposed; (2) Senator Domenici amends section 4 of S. 1480 because the Senator wanted to limit retroactive application of the statute (the Senator's amendment did not affect retroactive liability for response costs); (3) Senator Domenici's amendment is amended by Amendment No. 2631 (which does not alter the Senator's vision of retroactive liability for response costs); and (4) Amendment No. 2631 is enacted. Thus, courts have actually relied on the original version of S. 1480 which does not provide any express statement on retroactive liability, but which the Senate Committee on Environment and Public Works believed to allow for retroactive liability. One court provides, "the sum of this analysis is that the drafters of S. 1480, from which CERCLA's liability scheme derived, clearly intended it to apply retroactively, as was brought out in Senator Domenici's attempts to limit this reach." *Continental Title Co.*, 959 F. Supp. at 900.

assumptions regarding the original version of Senate Bill 1480, it is unlikely that these assumptions would have been apparent to other legislators. Because there is no explicit statement in the text of CERCLA and there were no legislative floor debates specifically on retroactivity, it is impossible to confirm that other members of Congress knew that the Senate Committee presumed the bill would operate retroactively. The speculations courts have used to justify retroactivity based on the series of CERCLA amendments represent an unreliable basis upon which to apply retroactivity. Post hoc efforts to impute Congressional intent are easily misguided because the intent of each member of Congress and the President may vary.

Moreover, even if it was possible to accurately determine the reason why particular provisions were included, those reasons may not be reflected in the actual law. It is the text of the law that must be complied with, not the reasons behind the law.[143] The fact that Congress enacted CERCLA under severe time constraints, under a suspension of rules, without extensive legislative debate, and without clear consensus[144] provides further justification for not attempting to divine what each legislator intended.[145] While it is permissible to use legislative intent to assist in implementation of a statute, as the district court noted, it is impermissible to use legislative intent to read new provisions into a statute.[146]

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[143]*See In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (stating that courts "do not inquire what the legislature meant; we ask only what the statute means") (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-418 (1899)); Nagle, *supra*, note 96, at 1429.

[144]Evidence in the record indicates that there was little consensus among the lawmakers. Senator Baker, the Minority Leader of the Senate, stated that "this compromise is a fragile thing." 126 CONG. REC. 30,916 (1980). Senators stated it would be impossible to pass the bill again, even unchanged. *Congress Clears "Superfund" Legislation*, 36 CONG. Q. ALMANAC, 584, 593 (1980). Senator Randolf, Chairman of the Committee on Environment and Public Works, also acknowledged considerable opposition to the Senate's legislative approach. 126 CONG. REC. 30,932 (1980). This opposition was reflected in the voting counts (the House vote on CERCLA was 274 to 94) and it has been asserted that the voting counts do not even adequately reflect the amount of conflict over the bill. Nagle, *supra*, note 96, at 1441. It has been asserted, however, that this lack of consensus did not relate to the retroactive application of CERCLA's liability provisions. United States v. Olin Corp., 107 F.3d 1506, 1514 (11th Cir. 1997). This assertion may be faulted for two reasons; not only was there insufficient time for comprehensive debate on retroactivity, but much of the debate that did take place was not covered in the legislative history.

[145]*See* United States v. Cordova Chem. Co., 59 F.3d 584, 588 (6th Cir.) (stating that it is difficult to divine the specific goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995).

[146]United States v. Olin Corp., 927 F. Supp. 1502, 1515 (S.D. Ala. 1996).

III. OUTSTANDING ISSUES REGARDING CERCLA'S RETROACTIVE APPLICATION

A. The Resource Conservation and Recovery Act

Although the issue is unaddressed in the *Olin* decisions, other courts analyzing CERCLA's retroactivity have recognized that one of the major purposes behind CERCLA's enactment was to fill the regulatory loopholes left by the Resource Conservation and Recovery Act (RCRA).[147] RCRA was enacted four years before CERCLA and provides a comprehensive regulatory system to control the entire hazardous waste life cycle.[148]

After RCRA's enactment, it became apparent that RCRA's prospective focus failed to protect against preexisting disposal sites of hazardous substances. During the late 1970s, scientists began to better appreciate that even after hazardous substances were buried, the substances could percolate through the soil, infiltrate groundwater tables, and persist over long periods of time.[149]

Several courts have used these facts as evidence that CERCLA should be applied retroactively.[150] These courts have generally reasoned that in determining the proper implementation of a statute, it is important to evaluate the statute in light of other laws[151] and the historical context of the statute's enactment.[152] Because CERCLA's legislative record indicates that Congress intended that CERCLA address the inactive hazardous substance sites left unaddressed by

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[147]42 U.S.C. §§ 6901-6992 (1996).

[148]*See id.*

[149]United States v. Shell Oil Co., 605 F. Supp. 1064, 1070-71 (D. Colo. 1985).

[150]*See, e.g., id.* at 1071; United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984); United States v. A & F Materials Co., 578 F. Supp. 1249, 1252 (S.D. Ill. 1984); United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983).

[151]*See* United States v. Shell Oil Co., 605 F. Supp. 1064, 1070 (D. Colo. 1985) (stating that CERCLA must be construed in light of previous statutes relating to environmental pollution); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.03 (5th ed. 1992) (stating that "[t]he legal history of a statute, including prior statutes on the same subject, is a valuable guide for determining what object an act is supposed to achieve. Other statutes on a subject, previous to or contemporary with enactment of the statute being construed, may also be helpful.").

[152]*See* Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247 (1953); United States v. Ruzicka, 329 U.S. 287 (1946); 2A J. SUTHERLAND, supra note 151, § 48.03 (5th ed. 1992) (supporting the evaluation of historical information). "It is the established practice in American legal processes to consider relevant information concerning the historical background of enactment in making decisions about how a statute is to be construed and applied. This would especially true where ... the statutory language is inadequate or unclear. These extrinsic aids may show the circumstances under which the statute was passed, the mischief at which it was aimed and the object it was supposed to achieve. . . ." *Id.*

RCRA,[153] it may be asserted that proper realization of CERCLA's purpose would require retroactive implementation.

The main argument against this line of reasoning is that CERCLA's purpose can still be fulfilled without the statute's retroactive application. Even if CERCLA's purpose is to address regulatory loopholes left by RCRA, it does not follow that Congress intended former owners and operators to be held liable for those response costs. This argument may be less persuasive after evaluating the amount of government funding made available for CERCLA response costs.[154]

B. The Hazardous Substance Superfund

Another issue courts have considered in determining whether CERCLA should be applied retroactively is the amount of money Congress allocated to the Hazardous Substance Superfund (Superfund).[155] This fund provides money for response costs in situations where responsible parties cannot be located or where there are insufficient funds available for cleanup.[156]

At the time of CERCLA's enactment, Congress understood that CERCLA-related environmental cleanup expenses greatly exceeded the amount of money in Superfund.[157] Although Superfund had $1.6 billion available for cleanup, the costs associated with responding to all the

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[153]*See* Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 661 (N.D. Ind. 1996) (stating that "[t]he debates and reports on the bills are clear that in enacting CERCLA Congress was responding to the problem posed by existing inactive waste dump sites."). The court declared that RCRA regulated the future dumping of waste, but did not provide authority to deal with existing dump sites where disposal had taken place before RCRA. *Id. See also* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 10, at 235-36 (remarks by Representative Madigan during the House debate on H.R. 7020 on September 19, 1980) (stating, "as many of us . . . recognized early on, there was definitely a gap in existing law in dealing with abandoned or orphan dump sites"). Senator Gore also commented, "The prospective dumping will be addressed in a regulatory program to take effect later this fall pursuant to the mandate of the Resource Conservation and Recovery Act. What we are addressing [in] this legislation is the dumping that occurred in the past." *Id.* at 239 (remarks by Senator Gore during House debate on H.R. 7020 on September 19, 1980).

[154]*See infra* notes 155-164 and accompanying text (discussing funding appropriated to the Superfund program).

[155]Superfund was established pursuant to section 111 of CERCLA, 42 U.S.C. § 9611 (1996).

[156]Superfund provides money to pay for government response costs and claims for necessary response costs incurred by any other person as a result of carrying out the provisions of the NCP. CERCLA § 111, 42 U.S.C. § 9611 (1996).

[157]*See* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1313 (N.D. Ohio 1983); CONG. REC. H9176 (daily ed. Sept. 19, 1980) (remarks of Representative Brown); *id.* at S.14,967 (daily ed. Nov. 24, 1980) (remarks of Senator Stafford).

contaminated sites existing in 1980 were between $7 and $44 billion.[158] Obviously, the $1.6 billion fund, by itself, was insufficient to pay for all the response costs needed at the time of CERCLA's enactment.

This fact may indicate that Congress must have intended to hold responsible parties liable for preenactment releases; otherwise it would be impossible to accomplish CERCLA's purpose. The persuasiveness of this argument is reinforced by the fact that Congress did not anticipate that Superfund would be depleted. Rather, Congress intended Superfund to provide an ongoing revolving fund capable of long-term future use.[159] Without the money generated through retroactive liability, the CERCLA program would begin operations billions of dollars short of its expected operating costs. Although no appellate courts have addressed the funding issue, at least one district court has considered it persuasive.[160]

This funding issue may have taken on a new importance since the *Landgraf* decision. *Landgraf* established that the presumption against retroactivity is rebutted when failure to apply a statute retroactively would render the law ineffective.[161] It may be argued that CERCLA would be rendered ineffective without retroactive application because if defendants are not liable for preenactment activities, CERCLA's cleanup program would be too debt-ridden to accomplish its purpose of cleaning up preexisting contaminated sites.

There are several responses that can, however, be raised in opposition to this line of reasoning. First, *Landgraf* also established that the presumption against retroactivity is not rebutted when retroactive application of a statute would merely vindicate the statute's purposes more fully.[162] The Supreme Court reasoned that Congress seldom enacts a statute for a single purpose and compromises necessary

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[158]*Georgeoff*, 562 F. Supp. at 1313. At that time, it was estimated that response costs would average approximately $3 million at each site. Congress referred to the $3 million estimate throughout the legislative history. *Id.*

[159]*Id.*; Note, *Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1232 (1982).

[160]*Georgeoff*, 562 F. Supp. at 1313-14 (concluding that based on the amount of funding allocated to the CERCLA program, Congress must have intended that CERCLA apply retroactively).

[161]Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994). *See also id.* at 272-74 (discussing situations where a statutory provision must be retroactive because a contrary reading would render the statute ineffective). Read broadly, the Supreme Court's discussion may indicate that even if Congressional intent is unclear, a statute must apply retroactively if a contrary reading would render it ineffective.

[162]*Id.* at 285-86.

for enactment may require the inclusion of provisions which undercut the statute's objectives.[163]

Second, it is not uncommon that federal programs lack sufficient funding. As the *Olin* district court commented, insufficient funding does not make a statute retroactive, and courts cannot replace the law that Congress clearly intended with law that is desirable.[164] Considering that Congress enacted CERCLA hastily and with minimal legislative review, it should not be surprising that implementation difficulties have surfaced.

C. CERCLA's Effective Date Clause

Courts have also evaluated section 302(a) of CERCLA as evidence in support of, and in opposition to, the retroactive application of CERCLA.[165] Section 302 provides that, "unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980."[166]

Proponents of CERCLA's retroactive application have argued that using the date of CERCLA's enactment as a point of reference, the past actions referred to in CERCLA must apply to conduct that occurred before December 11, 1980.[167] Put another way, the date identified in section 302 merely provides the time after which legal actions for former conduct can be brought. This analysis adheres to the rule of statutory interpretation which dictates that, whenever possible, a statute must be constructed so that every word has operative effect.[168]

On the other hand, section 302 has been a basis that the Act should only be applied prospectively. In *Ninth Avenue Remedial Group*

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[163]*Id.* at 286. For example, if a legislator, whose vote was necessary for enactment of a bill, opposed retroactive application of a statute, the proponents of the bill might eliminate retroactivity in order to secure the legislator's support (even if this compromise undermined some of the statute's objectives).

[164]United States v. Olin Corp., 927 F. Supp. 1502, 1518 (S.D. Ala. 1996).

[165]*See, e.g.*, Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732-33 (8th Cir. 1986); United States v. Shell Oil Co., 605 F. Supp. 1064, 1075 (D. Colo. 1985).

[166]CERCLA § 302(a), 42 U.S.C. § 9652 (1996).

[167]*Northeastern Pharm. & Chem. Co.*, 810 F.2d at 732-33 (establishing that December 11, 1980 represents the effective date indicating when an action can first be brought and when the time begins to run for issuing regulations and performing other future-oriented functions identified in the statute). *See also Shell Oil Co.*, 605 F. Supp. at 1075 (same).

[168]*See* United States v. Nordic Village, Inc., 503 U.S. 30 (1992) (reinforcing the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect); United States v. Menasche, 348 U.S. 528, 538 (1955) (same).

v. Fiberbond Corp.,[169] the defendant asserted that because section 302 replaced a clause in a bill prior to CERCLA which provided for retroactive application, Congress must have intended to prevent CERCLA's retroactivity.[170] The court rejected the argument by holding that the omission of the retroactivity clause was insufficient evidence to indicate that Congress clearly intended the statute to apply prospectively.[171]

D. Fundamental Fairness

Courts have also considered whether retroactive application of CERCLA's liability provisions violates fundamental issues of fairness and substantive due process rights.[172] This issue does not implicate whether Congress intended CERCLA to apply retroactively, but the issue addresses whether it is constitutional to apply CERCLA retroactively. It may be asserted that, because defendants complied with applicable environmental requirements at the time of disposal, it is unlawful to hold them liable for previous disposal activities.

Such arguments have generally failed on the grounds that CERCLA's liability scheme is rationally related to a valid legislative purpose.[173] Judicial precedent has established that although a defendant's activities may have been lawful at the time of disposal, it is not unjust to force a defendant to pay for later CERCLA response activities.[174] This conclusion may be bolstered by the fact that the risks to human health and welfare associated with the disposal of hazardous

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[169]*Ninth Ave. Remedial Group*, 946 F. Supp. at 651.

[170]*Id.* at 657.

[171]*Id.* at 658. The court noted that other cases have also determined that an effective date clause is meaningless in interpreting Congressional intent with regard to the application of a statute. *Id.* at 657. *See also* Moore v. Califano, 633 F.2d 727, 732 (6th Cir. 1980) (indicating that the effective date provision is inconclusive on the question of retroactivity); Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 409 (5th Cir. 1980) (same). *But see* Landgraf v. USI Film Prods., 511 U.S. 244, 256 (1994) (finding that omitted language on retroactivity represents an indication of a Congressional intent to eliminate a retroactive command); *id.* at 288 (Scalia, J., concurring) (finding that an effective date clause creates a presumption of a prospective effect).

[172]*See* United States v. Monsanto Co., 858 F.2d 160, 173-74 (4th Cir. 1988).

[173]*See* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986) (providing that the cleanup of contaminated disposal sites is a legitimate legislative purpose and Congress acted rationally in imposing liability for the cost of cleaning up such sites upon the parties that profited from the sites and the chemical industry as a whole); *Monsanto*, 858 F.2d at 173; United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984).

[174]*See, e.g.*, *Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d at 734; *Monsanto Co.*, 858 F.2d at 173.

substances, and the potential need to address those risks, were foreseeable at the time of the earlier disposal activities.[175]

The Supreme Court has also established that retroactive application of a statute may be justified in order to disperse economic hardships. In *Usery v. Turner Elkhorn Mining Co.*, the Supreme Court held that retroactive application of the Black Lung Benefits Act of 1972[176] did not violate due process.[177] The Supreme Court established that a presumption of constitutionality attaches to legislation that readjusts economic burdens and benefits.[178] The Supreme Court reasoned that even though the Black Lung Benefits Act imposed new liability on preenactment activities, retroactive application was a justifiable means of spreading the cost of disabilities to persons who had profited from former activities.[179]

The same reasoning that the Supreme Court used in *Usery* may be applied to CERCLA liability. By holding responsible parties liable for preenactment activities, CERCLA spreads response costs among the parties that most profited from activities associated with the disposed hazardous substances.

It can be argued, however, that the public has also received a substantial benefit from activities associated with the disposed hazardous substances through the availability of consumer products whose creation required use of hazardous substances. As such, the public should contribute some of the funding (raised through taxes) required to support government response actions focused on the cleanup of contaminated sites created before the enactment of CERCLA. Regardless of the persuasiveness of this argument, the assertion is more of a legislative policy decision rather than an issue to be decided by the judiciary.[180]

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[175]*Monsanto Co.*, 858 F.2d at 174.

[176]Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified as amended in scattered sections of 30 U.S.C. and 42 U.S.C.).

[177]428 U.S. 1, 15-18 (1976).

[178]*Id.* at 15. The Court noted that the burden of proving that the law is arbitrary and irrational falls on the claimant. *Id.*

[179]*Id.* at 18. The Court stated that the imposition of new liability for disabilities developed prior to the Black Lung Benefits Act was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of [the employees'] labor." *Id.* The Court stated, "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 16 (citations omitted).

[180]In addition, the assertion can be criticized in that the responsible parties (owners, operators, arrangers, and generators of hazardous substances) derived a disproportionate share of the benefits associated with hazardous substances. These parties benefitted from the profits derived from the sale and use of hazardous substances, as well as the availability of the ultimate

IV. INTERPRETATIONS AND CONCLUSIONS

A. Although Courts Agree That CERCLA Is Retroactive, Courts Disagree on the Evidence Supporting Retroactivity

The *Olin* district court opinion represented an anomaly in CERCLA caselaw. No case before or after[181] the district court opinion has held that CERCLA cannot be applied retroactively. This fact does not, however, indicate that the district court reached legal conclusions contrary to all judicial interpretations of CERCLA that preceded or followed the district court's analysis. In fact, many of the district court's conclusions have been shared by other courts.[182] The difference is that the district court, unlike all other courts, was not persuaded by *any* of the arguments supporting retroactivity.[183]

There is judicial disagreement on whether the language of CERCLA indicates that Congress clearly intended that CERCLA apply retroactively. Cases before and after the *Olin* decisions have differed on the evidentiary value of the statutory language.[184] Moreover, even among the courts finding that the statutory language provides a clear indication that the statute should be applied retroactively, those courts vary in concluding which statutory provisions demonstrate the required

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consumer products.

[181]Cases, after *Olin II*, that have addressed retroactivity include: Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996); United States v. Alcan Aluminum Corp., No. 87-CV-920, 1996 U.S. Dist. LEXIS 16358, (N.D.N.Y. October 28, 1996); Cooper Indus. v. Agway, Inc., 987 F. Supp. 92 (N.D.N.Y. 1996); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996); Gould, Inc. v. A & M Battery & Tire Serv., 933 F. Supp. 431 (M.D. Pa. 1996); and Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691 (D. Nev. 1996).

[182]*See infra* notes 184-192 and accompanying text discussing conclusions that previous courts have shared with the *Olin* district court.

[183]*See* United States v. Olin Corp., 927 F. Supp. 1502, 1512-19 (S.D. Ala. 1996) (evaluating the evidence that previous courts have used to justify CERCLA's retroactive application).

[184]*See, e.g., Nova Chems., Inc.*, 945 F. Supp. 1098 (stating that CERCLA's language does not determine that Congress clearly intended to apply CERCLA retroactively); *Cooper Indus.*, 987 F. Supp. 92 (holding that CERCLA's language provides clear evidence of a Congressional intent to apply CERCLA retroactively); *Ninth Ave. Remedial Group*, 946 F. Supp. 651 (indicating that CERCLA's language does not establish that Congress clearly intended to apply CERCLA retroactively); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986) (providing that CERCLA's language and statutory scheme demonstrate a clear congressional intent to apply CERCLA retroactively); United States v. Shell Oil Co., 605 F. Supp. 1065 (D. Colo. 1985) (stating that CERCLA's language does not determine that Congress clearly intended to apply CERCLA retroactively).

Congressional intent.[185] Some courts have focused on the use of the past tense in section 107 as an indication of Congress' intent to apply CERCLA retroactively.[186] Other courts have found that the past tense is not dispositive, but the natural resource provisions clearly indicate the statute should be applied retroactively.[187] The one area of general agreement is that the effective date clause does not, by itself, demonstrate that Congress clearly intended CERCLA to apply retroactively.[188]

The most frequently cited evidence that courts have used to justify CERCLA's retroactive application is its legislative history. There is, however, little judicial consensus on what elements in the legislative history establish CERCLA's retroactivity. Courts have focused on the amount of money that Congress appropriated to Superfund,[189] the series of legislative amendments altering liability,[190] and the purpose of the Act.[191] At least one court has found that all three elements provide clear evidence that Congress intended the liability provisions to apply retroactively.[192]

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[185]*Compare Alcan Aluminum Corp.*, 1996 U.S. Dist. LEXIS 16358, at *7 (stating that the language of section 107 makes it clear that Congress intended CERCLA to be applied retroactively) *with* Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. at 702 (holding that the natural resource provisions clearly indicate that Congress intended CERCLA to apply retroactively).

[186]*E.g.*, *Alcan Aluminum Corp.*, 1996 U.S. Dist. LEXIS 16358, at *7 (stating that the language of section 107 clearly indicates that Congress intended CERCLA to be applied retroactively). *See supra* notes 64-73 and accompanying text discussing the use of the past tense in CERCLA.

[187]*E.g.*, Nevada *ex rel.* Dept. of Transp. v. United States, 925 F. Supp. at 702 ; *Shell Oil Co.*, 605 F. Supp. at 1076. *See supra* notes 80 and 81, regarding the language of CERCLA § 107(f), 42 U.S.C. § 9607(f) (1996) and CERCLA § 111(d), 42 U.S.C. § 9611(d) (1996).

[188]*See supra* note 171 and accompanying text (dismissing the significance of the effective date clause in determining CERCLA's retroactive application).

[189]*E.g.*, Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1312-14 (N.D. Ohio 1983).

[190]*E.g.*, Continental Title Co. v. Peoples Gas Light & Coke Co., 959 F. Supp. 893, 897-98 (N.D. Ill. 1997); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 664 (N.D. Ind. 1996).

[191]*E.g.*, Cooper Indus. v. Agway, Inc., 987 F. Supp. 92 (N.D.N.Y. 1996) (holding that because Congress wanted to cleanup inactive and abandoned contaminated sites and have the responsible parties pay for that cleanup, Congress clearly intended that CERCLA be applied retroactively); Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. at 702 (noting that CERCLA was designed to fill the regulatory gaps left by RCRA and clean up inactive sites).

[192]Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. at 691.

B. The *Olin* District Court Decision Presented a Unique Set of Circumstances for CERCLA's Retroactive Analysis

To rebut the presumption against retroactivity, a court must find sufficient evidence to demonstrate that Congress clearly intended to apply the statute retroactively.[193] In light of the exacting nature of this requirement, it raises an issue of how so many courts can review the same evidence, reach different interpretations, and yet still conclude that the evidence demonstrates that Congress clearly intended to apply CERCLA retroactively. If the evidence was as clear as the standard requires, it seems that there would be more consistency within the judicial analysis.

Despite this issue, the *Olin* district court is still the only court to find that CERCLA cannot be applied retroactively. There may be two major reasons for this fact. First, the doctrine of *stare decisis* may have discouraged contrary interpretations.[194] After fifteen years of CERCLA caselaw, defense attorneys would be more reluctant to vigorously assert an argument that has lost in several previous cases knowing that judges would be hesitant to depart from precedent. While this point may be true for most judges, the judge in the *Olin* district court case has demonstrated a willingness to depart from CERCLA precedent when the precedent diverges from the actual text of the statute.[195]

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[193]Landgraf v. USI Film Prods., 511 U.S. 244, 272-73 (1994).

[194]The doctrine of *stare decisis* requires courts to reach analogous conclusions when presented with the same or substantially similar issues in subsequent cases with different parties. The doctrine promotes consistency, fairness, and predictability within the law. Jolly, Inc. v. Zoning Bd. of Appeals, 676 A.2d 831 (Conn. 1996). *See also* Restifo v. McDonald, 230 A.2d 199, 204 (1967) ("there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society.") (Bell, J., dissenting) (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1038-39 (1990) (explaining that *stare decisis* increases the sum of social welfare by enhancing the law's predictability, economizing judicial resources, and strengthening the prestige of legal institutions).

[195]The judge in the *Olin* district court decision also recently diverged from CERCLA precedent in Redwing Carriers, Inc. v. Saraland Apartments, 875 F. Supp. 1545 (S.D. Ala. 1995). In that case, the judge held that the plain language of CERCLA requires that a party both *own and operate* a facility in order to be liable under section 107(a)(1). This holding differed from previous cases which determined that Congress meant to hold an owner or an operator liable; Congress did not intend that a party must meet both qualifications in order to incur liability. This decision was reversed, in part, on appeal. *See* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996). It may also be important to note that the judge has criticized the role and authority of administrative agencies. *See supra* note 25 (regarding the *Olin* district court judge's statements concerning administrative agencies). It is unclear whether this viewpoint may have

In addition to the particular judge assigned to hear the issues in the *Olin* district court case, the timing of the *Landgraf* decision may have also contributed to the outcome of the lower court opinion. *Landgraf* provided important guidance on retroactive analysis which reflected directly on the analysis previously used to justify CERCLA's retroactive application. The Supreme Court decided *Landgraf* shortly before the *Olin* district court decision,[196] and the *Olin* district court was the first court to squarely address CERCLA's retroactive application after *Landgraf*.[197] The combination of the unique legal circumstances, along with the particular judge selected for the case, may have precipitated the district court's holding.

C. The Totality of Evidence Demonstrates That Congress Clearly Intended CERCLA to Apply Retroactively

Although the *Olin* district court decision is the only decision to hold that CERCLA is not retroactive, it is apparent that courts have struggled with the implementation and interpretation of CERCLA.[198] In their attempts to implement CERCLA's general requirements, courts have been obligated to solve ambiguities present in the statute's text and legislative history.[199] This has resulted in inconsistent judicial analysis which is perpetuated by the doctrine of *stare decisis*. This fact, however, does not demonstrate that the cases which have addressed CERCLA's retroactivity have established a completely improper legal precedent.

Contrary to the district court's holding, the evidence supporting retroactivity is present in the text and legislative history. Previous legal decisions have been too eager, however, to find clear evidence in those sources. Some decisions analyzing the evidence supporting CERCLA's

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contributed to the outcome of the case.

[196]The *Olin* district court decision was issued on May 20, 1996. The Supreme Court decided *Landgraf* on April 26, 1994.

[197]United States v. Olin Corp., 927 F. Supp. 1502, 1507 (S.D. Ala. 1996).

[198]Numerous courts have indicated that CERCLA's legislative history is difficult to interpret. *See, e.g.*, United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (stating that "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."); CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432, 435 (D.N.H. 1991).

[199]In their attempts to fill in these gaps, courts have criticized CERCLA as being poorly drafted legislation. *See, e.g.*, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989); Roe v. Wert, 706 F. Supp. 788, 792 (W.D. Okla. 1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983).

retroactivity have relied upon single pieces of evidence which do not satisfy the exacting criteria outlined in *Landgraf*. For example, the post hoc efforts that manufacture clear legislative intent from the series of unaddressed legislative amendments do not fulfill the standards required to overcome the presumption against retroactivity. Without maintaining the strict standards required to apply a law retroactively, courts replace the law that Congress established with law that courts find desirable. It is not the judiciary's prerogative to repair inconsistencies within the Act.[200]

After an independent review of all the evidence used to illustrate Congress' intent on CERCLA's retroactive application, it appears that no evidence in the statute's language or the legislative history, by itself, provides sufficient evidence to rebut the traditional presumption against retroactivity. If a piece of evidence, taken in isolation, was as demonstrative as the legal standard requires, there would be more uniformity in the judicial analysis. The totality of all the evidence does, however, justify retroactive application of the statute. The combination of: (1) the use of the past tense in section 107(a)(1); (2) the notification provision; (3) the natural resource provisions; (4) the effective date clause; (5) the amendment process; (6) the legislative purpose; and, (7) the funding appropriated for the Superfund program demonstrate a clear Congressional intent to apply CERCLA retroactively. Only the combination of all this circumstantial evidence justifies a rebuttal of the presumption against retroactivity.

D. The *Olin* Court of Appeals Decision May Galvanize Legislative Efforts to Eliminate CERCLA's Retroactive Liability

In response to perceived unfairness associated with the retroactive application of CERCLA's liability provisions, there has been great interest in a broad legislative reconstruction of the Act. There have been several legislative efforts to reauthorize CERCLA, and the repeal of its retroactivity has been one of the most controversial issues associated with CERCLA reauthorization.[201] In light of the *Olin* court of appeals decision, any changes to CERCLA's applicability to preenactment activities must occur through the legislative process, as

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[200] *See* United States v. USX Corp., 68 F.3d 811 (3rd Cir. 1995) (stating that it is not the judiciary's prerogative to resolve the inconsistencies that permeate CERCLA).

[201] *See* Carney, Badley, Smith, & Spellman, *Update on Superfund Reform*, WASH. ENVTL. COMPLIANCE UPDATE, Vol. 3, No. 5, Nov. 1996 (describing political disagreements over the prospect of reforming CERCLA's retroactive application).

CERCLA's retroactive application will not be eliminated through the judiciary.

Congressional repeal of CERCLA's retroactivity, in the near future, appears unlikely. Previous attempts to repeal its retroactivity have been met with determined opposition from environmentalists, as well as state governments that rely on the current liability scheme to pay for response costs.[202] Moreover, because there has been strong disagreement over the extent of necessary changes to CERCLA, any reform effort will encounter some degree of opposition.[203]

If Congress reaches an agreement on changes to CERCLA's retroactive application, it is more likely that the changes will take the form of specific exemptions to CERCLA liability rather than a universal repeal of retroactive liability.[204] For example, there have been recent alterations to the liability of financial lenders,[205] and there is considerable interest in reducing the liability of small businesses and municipalities.[206] The Clinton Administration has indicated that it strongly opposes the repeal of retroactive liability but has expressed a willingness to reduce liability for small volume contributors.[207] In light of the reversal of the *Olin* district court decision, it appears that retroactivity will continue to be the general standard of liability, but specific categories of responsible parties may be exempted from the liability associated with preenactment activities through the political process.

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[202]Nagle, *supra* note 96, at 1454; Jennifer Silverman, *Superfund: Both Sides of Liability Issue to Testify Before Oxley Panel*, Env't Rep. (BNA), Oct. 26, 1995.

[203]Bowker, *supra* note 6 (describing the opposing positions on CERCLA reauthorization taken by the Clinton Administration and the business community); *Superfund: House Democrats' Letter to GOP Continues to Fault Oxley's Bill, Negotiations*, Env't Rep. (BNA), June 24, 1996; *Superfund Talks Break Down*, SUPERFUND WEEK, Vol. 11, No. 31, Aug. 8, 1997.

[204]*See, e.g.*, S. 8, The Superfund Cleanup Acceleration Act of 1997, 105th Cong. (1997) (proposing that all co-disposal landfill generators, arrangers, and transporters be exempted from liability associated with activities that took place before January 1, 1997). The bill would also place a limit, as determined by the size of the local community, on the liability of municipal landfill owners and operators. *Id. See also Senate GOP Unveils Reauthorization Plan*, SUPERFUND WEEK, Vol. 11, No. 4, Jan. 24, 1997.

[205]Carney, Badley, Smith, & Spellman, *supra* note 201. These reforms codified EPA's previously adopted lender liability regulations. *Id.* The new regulations provide that lenders who loan money to polluters, and lenders who choose to foreclose on loans, will be less likely to incur CERCLA liability. *Id.*

[206]*Id. See also* S. 8, The Superfund Cleanup Acceleration Act of 1997, 105th Cong. (1997).

[207]*Clinton Administration Outlines Firm Stand on Superfund Issues*, REAL ESTATE/LIABILITY NEWS, Vol. 8, No. 16, June 13, 1997.